

May, 1992

## ***HONOR ROLL***

*385th Session, Basic Law Enforcement Academy, January 8 through March 27, 1992*

*President: Deputy Richard A. Hecht - Pierce County Sheriff's Department*  
*Best Overall: Deputy Jon Van Gesen - Kitsap County Sheriff's Department*  
*Best Academic: Deputy Jon Van Gesen - Kitsap County Sheriff's Department*  
*Best Firearms: Officer Kyle M. Bear - Auburn Police Department*  
*Best Mock Scenes: Deputy Ricky L. Wasson - Pierce County Sheriff's Department*

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*Corrections Officer Academy - Class 167 - March 16 through April 10, 1992*

*Highest Overall: Officer Jon S. Hornbuckle - Renton Police Department/Jail*  
*Highest Written: Officer Carl S. Weeks - Indian Ridge Corrections Center*  
*Highest Practical Test: Officer Jon S. Hornbuckle - Renton Police Department/Jail*  
*Highest in Mock Scenes: Officer Linda Curtis-Downey - DOC/Tacoma Pre-Release*  
*Officer Lance E. King - Washington State Penitentiary*  
*Highest Defensive Tactics: Officer Joan Kleinsmith - Mason County Jail*

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## **MIRANDA UPDATE**

### **ARREST - NOT TERRY SEIZURE, NOT FOCUS - IS SOLE TRIGGER TO MIRANDA**

*For the past few years, your LED Editor has occasionally heard from law enforcement officers in certain cities and counties that they are being told by local judges (and therefore by deputy prosecutors), generally in regard to their enforcement of the middle class crimes of DWI and MIP, (1) that focus of investigation or (2) that restriction of freedom consistent with a Terry stop, triggers Miranda. Accordingly, some local judges are ruling, and some deputy prosecutors are advising, either: (1) that when an officer develops probable cause*

to arrest and thus focuses on a suspect, or (2) that once a person's freedom of movement is restrained in a Terry stop, Miranda warnings must precede any questioning. Thus, some officers have been advised to Mirandize in most Terry stop situations and/or in situations where no seizure has occurred (e.g. phone call) but PC exists. While a when-in-doubt-admonish approach may seem to be the most practical short-term approach in light of these erroneous local adjudications, we are disturbed that nothing is being done to rectify the error. There is absolutely no basis in the controlling case law for such rulings. Indeed, the U.S. Supreme Court has flatly rejected such an approach in two DWI stop cases, and the State Supreme Court has cited the U.S. Supreme Court rule with approval.

In Berkemer v. McCarty, 468 U.S. 420 (1984) Oct. '84 LED:01 and in Pennsylvania v. Bruder, 488 U.S. 9 (1988) May '89 LED:05 the U.S. Supreme Court ruled that Miranda is not generally required in a DWI stop prior to or during field sobriety testing and roadside questions about alcohol consumption because, even though the suspect is being physically restrained, the detainee is not being subjected at the moment to the "functional equivalent of an arrest." Thus, only when the custody is the functional equivalent of a custodial arrest (as opposed to the mere temporary detention of a Terry stop) is Miranda required under Berkemer and Bruder. Citing Berkemer, the Washington Supreme Court adopted the same standard as a singular Miranda trigger in State v. Short, 113 Wn.2d 35 (1989) Oct. '89 LED:13. Short also clearly rejected the argument that "focus" (or probable cause to arrest) triggers Miranda in the absence of arrest-equivalent custody. Recently, the State Supreme Court declared in a different context in State v. Post, 118 Wn.2d 596, 606 (1992):

"Custody" for Miranda purposes is narrowly circumscribed and requires ""formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest." [Citations omitted]

Washington cases holding that questioning during a temporary seizure under Terry v. Ohio does not require Miranda warnings include the following: State v. McKeown, 23 Wn. App. 582 (Div. III, 1979) Oct. '79 LED:05; State v. Marshall, 47 Wn. App. 322 (Div. I, 1987) June '87 LED:10; State v. Cameron, 47 Wn. App. 878 (Div. I, 1987) Feb. '88 LED:12; and State v. Wilkinson, 56 Wn. App. 812 (Div. I, 1990) Oct. '90 LED:03. A case which supports the view that Miranda warnings are not generally required during telephonic questioning is State v. Denton, 58 Wn. App. 251 (Div. I, 1990) Oct. '90 LED:01. The law couldn't be clearer, we believe (this is the editorial "we" of a singular frustrated editor and trainer). We urge officers who are having problems in this legal area to have their chief or sheriff or his or her designee: (a) show this LED entry to their prosecutor, and (b) ask what can be done to correct this injustice. Discretionary review of erroneous decisions of local judges may be pursued in the Court of Appeals under RAP 2.3 instead of going to trial without the incriminating statements. We are confident that amicus curiae (friend of the court) help would be provided to any prosecutor who took such a case to the Court of Appeals. What has been the point of prosecutors taking past cases to the Supreme Court if the DWI criminal defense bar is to have the last word anyway? Just because many of these specialized practitioners make more money than the judges (including Supreme Court justices) doesn't make them right.

## **BRIEF NOTES FROM THE U.S. SUPREME COURT**

***(1) USE OF UNLAWFUL FORCE BY CORRECTIONS OFFICER MAY TRIGGER CIVIL RIGHTS SUIT BASED ON EIGHTH AMENDMENT VIOLATION EVEN THOUGH INJURY TO PRISONER IS NOT "SIGNIFICANT"*** -- In Hudson v. McMillian, 60 LW 4151 (1992) the U.S. Supreme Court rules 7-2 that the nature or extent of an injury cause to an inmate by unlawful use of force by corrections officers need not be significant in order for the inmate to have the right to sue under the Civil Rights act for an Eighth Amendment violation. If the unlawful force is applied "maliciously and sadistically" (a requirement for such suits imposed by the U.S. Supreme Court in Whitley v. Albers, 38 CrL 3161 (1986) -- see June '86 LED:18) then the fact that the injury incurred is relatively insignificant does not bar the inmate's Civil Rights suit under the Eighth Amendment. Only de minimis use of force is excluded from coverage. Result: federal magistrate's original ruling, awarding \$800 in damages (plus "reasonable" attorney fees, we assume) to Louisiana state prison inmate, Keith Hudson, reinstated; Court of Appeals ruling reversed.

**LED EDITOR'S NOTE**: As noted above, the 1986 ruling in Whitley v. Albers continues in full force; the inmate's suit must focus on the correctional officer's mental state at the time of application of the force. Whitley held that if force is applied in good faith, then the suit is barred even if it is later determined that the officer's use of force was unreasonable.

***(2) NEW YORK'S "SON OF SAM" LAW VIOLATES FIRST AMENDMENT*** -- In Simon & Schuster Inc. v. N.Y. State Crime Victims Board, 60 LW 4029 (1991) the U.S. Supreme Court invalidates New York's "Son of Sam" law on First Amendment grounds. The New York law, which is similar to a Washington law at RCW 7.68.200 - .280, requires that any person contracting with a person (a) accused of, (b) convicted of, or (c) admitting to commission of a crime turn over any income from a book or other work about the crime to the state to be held in escrow for a five-year period for the compensation of crime victims.

The Court holds that such a law is a conduct-based limit on speech unjustified by state interests in compensating victims of crime from the proceeds of the speech of wrongdoers speech about their crimes. Because the content-based restriction on speech in New York's law is not narrowly tailored to achieve a compelling state interest, it violates the First Amendment, the Court holds. Result: New York State enjoined from enforcing its law.

**LED EDITOR'S NOTE**: Because Washington's "Son of Sam" law is closely modeled after the New York law, our law is probably also violative of the First Amendment.

***(3) CONFRONTATION CLAUSE CHALLENGE FAILS -- ESTABLISHED HEARSAY EXCEPTIONS SUPPORT ADMISSION OF CHILD HEARSAY EVEN THOUGH NO SHOWING BY STATE OF "UNAVAILABILITY" OF THE CHILD WITNESS TO TESTIFY*** -- In White v. Illinois, 60 LW 4094 (1992) the United States Supreme Court holds in a child sexual abuse case that the Sixth Amendment's Confrontation Clause does not require, as a condition for admission of out-of-court statements that qualify as hearsay exceptions for spontaneous declarations or statements made in course of securing medical treatment, that the proponent of statements either (a) show that declarant is "unavailable" to testify or (b) produce declarant at trial.

The ruling is White has broad applicability to hearsay statement of all witnesses, not just child witnesses. Focusing for the moment on White's application to child sexual abuse prosecutions, we believe that this ruling of the Supreme Court supports the admission of adult witness testimony regarding child hearsay statements of sexual abuse whenever those statements qualify under the well-established hearsay exceptions for spontaneous declarations or for statements made in the course of obtaining medical treatment. Even where the State fails: (a) to produce the child at trial to testify or (b) to show that the child is "unavailable" to testify (i.e., even where the availability/corroboration requirements of a child abuse hearsay statute such as Washington's RCW 9A.44.120 are not met -- see State v. Bishop, 63 Wn. App. 15 (1991) Feb. '92 LED), those statements that meet a well-established hearsay exception will nonetheless be admissible. Result: affirmance of State of Illinois trial court convictions for aggravated criminal sexual assault and two other charges.

***(4) ADMISSION OF EVIDENCE OF CHILD'S PRIOR NON-ACCIDENTAL INJURIES TO SHOW SHE WAS "BATTERED" NOT A VIOLATION OF DUE PROCESS CLAUSE*** -- In Estelle v. McGuire, 50 CrL 2012 (1991) a unanimous U.S. Supreme Court rules that admission by a California trial court of evidence of prior non-accidental bodily injuries suffered by a deceased infant was relevant to show that her death was not an accident and to show that she was a "battered child". Therefore, the admission of that evidence at her father's murder trial in state court did not violate the Fourteenth Amendment's Due Process Clause even though no evidence linked him to those earlier injuries. Result: Ninth Circuit Court of Appeals ruling on McGuire's habeas corpus petition reversed; Supreme Court finds no basis for habeas relief.

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## **BRIEF NOTE FROM THE NINTH CIRCUIT COURT OF APPEALS**

***DEPARTMENT OF CORRECTIONS' CROSS GENDER PAT-SEARCH POLICY MEETS CONSTITUTIONAL CHALLENGE*** -- In Jordan v. Gardner, 953 F.2d 1137 (9th Cir. 1992) the policy of the Washington Corrections Center for Women allowing for random "pat searches" of female inmates by male, as well as female, corrections officers is upheld against a constitutional challenge by the U.S. Court of Appeals for the Ninth Circuit.

The challenge by the female inmates against pat-searches by male officers had been grounded in the First, Fourth and Eighth Amendments of the U.S. Constitution. The federal district court judge (Robert J. Bryan) had agreed with the expert witnesses for the inmates (including pop psychologist Jennifer James) and had issued an injunction against the policy on grounds that the policy was without institutional justification. However, based on the testimony by prison officials and their experts, the majority of the Ninth Circuit rules that policy is justified because limiting pat-searches to same-sex officers: (1) would create security problems by requiring female guards to leave their posts to conduct the searches, (2) would make the "random" searches too predictable, and (3) would conflict with the corrections officers' collective bargaining agreement.

The limited nature of the intrusion involved in the random pat searches is described in the majority opinion as follows:

The pat search is conducted on fully clothed inmates, and lasts between 45 seconds and one minute. During the search, guards stand next to the inmate, and quickly run their hands over the inmate's body. Contact with the breasts and

crotch is brief and restricted.

Result: district court injunction set aside, DOC policy upheld as constitutionally valid.

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## **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

***(1) DRUG LAW DOES CRIMINALIZE BEHAVIOR OF LANDLORD WHO DISCOVERS TENANT'S GROW OPERATION AND PERMITS THAT TENANT TO CONTINUE ILLEGAL ACTIVITY*** -- In State v. Sigman, 118 Wn.2d 442 (1992) a unanimous State Supreme Court reverses a decision of the Court of Appeals (see 60 Wn. App. 1 (Div. II, 1990) April '91 LED:08). The Court of Appeals had incorrectly construed RCW 69.53.010(1), which makes it unlawful for a building owner to, among other things, make a building "available for use" in growing marijuana, as not applying to an owner who discovers a tenant's marijuana grow operation in progress and does nothing about it.

The State Supreme Court rules that making a premises "available" is a continuing act and can occur by silent acquiescence in a tenant's known illegal activity. Thus, even if the initial act of making the building available to the tenant occurs before the owner's discovery of the illegal conduct, the owner's subsequent acquiescence in the continued illegal activity constitutes making the premises available and violates the statute.

The Supreme Court also rules that RCW 69.53.010(1) is not void for vagueness, thus reversing an earlier trial court decision to that effect.

Result: Court of Appeals ruling reversed; Thurston County Superior Court ruling (on constitutional, void-for-vagueness grounds) setting aside a jury verdict of guilty of knowing violation of RCW 69.53.010 reversed; Sigman's conviction is reinstated and the case is remanded for sentencing.

***(2) IMMUNITY PROVISION OF DOMESTIC VIOLENCE ACT DOESN'T PROTECT POLICE FROM BEING SUED FOR "FAILURE TO ENFORCE"*** -- In Roy v. Everett, 118 Wn.2d 352 (1992) the State Supreme Court rules that the immunity granted to law enforcement officers (and their agencies) under RCW 10.99.070 does not protect them from civil liability for damages arising from their failure to enforce the law.

The civil suit had been brought against the City of Everett, its police officers, and others by a woman who had been terrorized and abused by a man with whom she had lived at one time. She alleged (a) a pattern of nonenforcement of the Domestic Violence Act by the police, and (b) a failure of police to take steps to protect her and her daughter.

Ruling that RCW 10.99.070 did not provide immunity from suit for nonenforcement (as opposed to active enforcement) of the Domestic Violence Act, the trial court judge had denied a summary judgment motion by the city and the police officers.

RCW 10.99.070 of the Domestic Violence Act provides qualified immunity for law enforcement as follows:

A peace officer shall not be held liable in any civil action for an arrest based on

probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

While this statutory language expressly provides immunity for "acts" and "omissions", the Supreme Court majority asserts that the trial court had been correct when it had declared:

Defendant City and police officers' immunity under RCW 10.99.070, construed in light of the entire Domestic Violence Act, is limited to conduct in the course of an arrest or other on-the-scene action such as entering the home to break up a fight.

Result: trial court ruling affirmed, case remanded to Snohomish County Superior Court for trial on Ms. Roy's "failure to enforce" theory.

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## **WASHINGTON STATE COURT OF APPEALS**

### ***ANONYMOUS PHONE TIP RE: MAN "BRANDISHING SAWED-OFF SHOTGUN" DOESN'T JUSTIFY TERRY STOP; REASONABLE SUSPICION NOT ESTABLISHED BY TIP***

State v. Vandover, 63 Wn. App. 754 (Div. II, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

At about 9:52 p.m. on April 13, 1989, Officers Thomas and Schilke of the Port Angeles Police Department responded to a radio report that "a man in a gold colored Maverick was brandishing a sawed-off shotgun" in front of a restaurant in downtown Port Angeles. This report was issued in response to an anonymous telephone tip. The record did not indicate whether the informant's tip was based on an eyewitness account.

Both officers, traveling in separate vehicles, arrived at the restaurant and spotted the appellant getting into a green Maverick. The green Maverick drove away and the police officers continued to look for a gold Maverick. Some time later, Officer Thomas spotted the green Maverick and proceeded to follow it with the intention of pulling it over. The officer then turned on his emergency lights, the Maverick came to a stop, and the defendant came out of his car and began walking back to meet the police officer.

Officer Thomas told Vandover about the anonymous report that a man with a gold Maverick was brandishing a sawed-off shotgun in downtown Port Angeles. When asked if he had a shotgun in his car Vandover replied that he had a friend's shotgun in the trunk of the Maverick. He opened the trunk at the officer's request and the officer spotted a full-size 12-gauge shotgun covered with a gray denim jacket. After directing Vandover to stand away from the vehicle, the officer discovered that the weapon was loaded.

Officer Schilke, who arrived at the scene later, looked into the car and spotted what appeared to be a firearm sticking out from under the seat. He then opened the car door, reached under the seat, and pulled out a handgun. Vandover was placed

under arrest and Officer Schilke searched the rest of the car. During the course of this search he discovered 11 folded paper bindles containing what was later determined to be 13 grams of cocaine.

At a pretrial suppression hearing, the court held that the detention was justified because it was based on a reasonable suspicion of criminal activity and therefore the evidence gathered incident to it was admissible.

[Vandover was convicted of possession of a controlled substance with an intent to deliver.]

ISSUE AND RULING: Did the anonymous telephone tip justify the Terry stop of Vandover's vehicle? (ANSWER: No, because the tipster's credibility was not established and because the tip was not corroborated sufficiently) Result: Clallam County Superior Court conviction for VUCSA reversed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Under the fourth amendment to the United States Constitution, which proscribes unreasonable searches and seizures, an investigatory stop is unlawful where the stop constitutes a seizure and the stop is not based on a reasonable suspicion of criminal conduct. . . . A seizure takes place where, under the totality of the circumstances, a reasonable person would not consider departure a realistic alternative. . . . A seizure occurred when Officer Thomas turned on the emergency lights with the intent of pulling Vandover over and in response Vandover stopped. . . .

The remaining question is whether this seizure was reasonable. A seizure is reasonable only if an officer has a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." . . . A number of Washington cases have dealt specifically with the situation presented by the case at bench; namely, whether an anonymous informant's tip is sufficient to establish a reasonable suspicion of criminal conduct.

The rationale behind the requirement of an apparent basis for the informant's personal knowledge was articulated by LaFave in his treatise on search and seizure:

It makes no sense to require some "indicia of reliability" that the informer is personally reliable but nothing at all concerning the source of his information, considering that one possible source would be another person who was totally unreliable.

3 W. LaFave, Search and Seizure § 9.3(e), at 481 (2d ed. 1987). In response to the contention that anonymous tips should be assumed to be eyewitness accounts, LaFave argues

there is simply no established need to go to this extreme; as Justice White once observed, "if it may be so easily inferred . . . that the informant has himself observed the facts or has them from an actor in the event, no possible harm could come from requiring a statement to that effect."

. . . We agree that establishing the basis for the informant's knowledge is vital in establishing the reliability of the tip on which the reasonableness of the investigatory stop depends.

There was no indication on the record whether the anonymous informant in the case at bench was an eyewitness to the event described. During the suppression hearing the informant remained anonymous. The police dispatcher did not testify as to the substance of the tip, and the police officers testified that they were only aware that the tip was anonymous. The record is completely devoid of any evidence as to what the basis of the anonymous tipster's knowledge was, nor does it contain any evidence showing that this basis was otherwise reliable.

Not only was there no apparent basis for the informant's knowledge, there were no other indicia of reliability. The police officers made no corroborative observations pointing to the existence of criminal activity. Additionally, the details of the informant's tip did not match what the police actually observed. It is clear that neither the basis of the informant's knowledge nor the surrounding circumstances demonstrated that the anonymous tip in this case was reliable.

The State attempted to justify the investigatory stop and detention of Mr. Vandover on the grounds that under State v. Franklin, 41 Wn.App. 409 (1985)[Nov. '85 LED:12], the potential danger to the public may be a factor making an investigatory stop more reasonable. Although the Franklin court did cite potential danger to the public as one of the factors in its decision that the investigatory detention was reasonable, in Franklin the informant was clearly an eyewitness and the officer immediately corroborated the details of the tip. Franklin does not stand for the proposition that potential danger to the public is a substitute for a reliable informant. Rather, it is clear that under Franklin, danger posed to the public is a factor which may make an investigatory stop reasonable under the circumstances where there are already indications that the informant's tip was reliable.

Although the tip in the case at bench did indicate that there may have been a danger posed to the public by a person wielding a shotgun, there is no reason to believe that the informant's tip was reliable. We therefore hold that the investigatory stop and arrest of Vandover was unreasonable, and the evidence seized as a result of this detention should have been suppressed.

[Some citations omitted]

#### **LED EDITOR'S COMMENT:**

This decision does not mean that no anonymous phone tip about a person brandishing or shooting a gun would be insufficient to justify a Terry stop. As the Court of Appeals points out: (a) the record was totally devoid of any details about the basis of information underlying the anonymous phone tip, and (b) the tip was not well-corroborated by the officers' observations. Better evidence on either element would probably save a stop based on an anonymous tip in the future under otherwise similar, imminent-danger circumstances.

#### ***GANG MEMBER'S "C" HAND SIGNAL DOESN'T JUSTIFY TERRY STOP OF VEHICLE***

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

On June 2, 1989, at approximately 5:20 p.m., Seattle Police Officers Dave Redemann and Mike LeBlanc were on the corner of 28th Avenue South and Jackson talking with members of the Black Gangster Disciples, a "gang", when a car drove by them. According to Officer Redemann, the occupants of the vehicle yelled something and gave a "C" hand signal, indicating that they were members of a rival gang known as the Crips.

As the vehicle drove away the officers returned to their unmarked car and began following it. After about a mile and a half, the officers caught up with the vehicle and effectuated a stop. When the officers approached the vehicle they noticed that the occupants, including Rowe, were not wearing seat belts. Because the failure to do so was a traffic violation, the officers asked the occupants to step out of the car. The officers searched the occupants for weapons and conducted a radio check of their names.

Rowe identified himself to the officers as Andrew H. Rowe, June 7, 1974, and stated that he had a prior arrest. However, the radio dispatcher could not verify this information. Rowe then suggested that the officers try Andrew Rowe Henderson. At this point the officers arrested him for false reporting in violation of a city ordinance. A subsequent search of Rowe at the police station resulted in the seizure of two pieces of rock cocaine.

On August 1, 1989, Rowe was charged by information with one count of possession of a controlled substance, RCW 69.50.401(d). Pursuant to CrR 3.6, Rowe moved to suppress the cocaine as the product of an illegal search and seizure. At the suppression hearing, Officer Redemann testified that the making of rival gang hand signals "sometimes will lead to a . . . drive-by or a retaliation shooting" and "pretty much" always provokes a reaction. Redemann further stated that the purpose for stopping the vehicle was "to find out or decide what their intentions were when they went by and started doing that." After hearing the testimony of the arresting officers, the trial court denied the motion to suppress and entered the following oral findings and conclusions:

Well, I think what we have to keep in mind here is that we are dealing with a very specialized cultural milieu, and certainly [O]fficer Redemann is, I think a sufficient expert . . . in this particular culture.

And while forming your fingers into the letter C and waving it out the window as an objective thing certainly are not fighting words or anything that would indicate any kind of criminal activity, in this particular culture, I'm satisfied that it is.

The testimony was uniform from both officers that this more often than not was a challenge that often wound up in fights with weapons and injury or death. So I feel that the officers did have sufficient grounds to proceed and investigate.

Rowe was subsequently found guilty.

**ISSUE AND RULING:** Did Rowe's use of the hand signal give the officers reasonable suspicion of unlawful activity justifying their stop of Rowe's vehicle? (**ANSWER:** No) **Result:** King County Superior Court conviction for possession of controlled substances reversed.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

A person may be stopped by the police without a warrant if the officer has a reasonably well-founded suspicion of criminal activity based on specific and articulable facts, not necessarily rising to the level of probable cause to arrest. . . . The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. . . . The court considers the officer's training and experience when determining the reasonableness of a Terry stop.

In this case, the initial stop of the vehicle was improper. The only information available to the officers was that the occupants of the car flashed a hand signal of a rival gang and continued driving away in one direction for a mile and a half. Although Officer Redemann testified that the flashing of hand signals "sometimes" leads to violence, the State offered no evidence that violence would occur on this occasion. The vehicle did not stop or back up, nor did it turn around the block to drive past the group again.

We reject the implicit assumption that the mere expression of one's status as a gang member provides the necessary basis for conducting an investigative stop. We hold that in the absence of facts which indicate that violence is imminent, reasonable suspicion under Terry does not exist.

Accordingly, we reverse the trial court's denial of Rowe's motion to suppress and dismiss the case.

[Citations omitted.]

**LED EDITOR'S COMMENT:**

This decision does not mean: (a) that law enforcement officers cannot be established as gang behavior experts, or (b) that such officers will not be allowed to testify in other circumstances as expert witnesses regarding the meaning of gang hand signals, or (c) that when gang hand signals communicate threats or invite attack, the officers will not be justified in making a stop. The Rowe decision simply means that identification of oneself as a gang member, alone, will almost never justify a Terry stop, regardless of the expertise of the officer regarding gang behavior.

***CUSTODIAL ARREST LAWFUL WHERE DRIVER HAD A HISTORY OF FTA'S***

State v. Reeb, 63 Wn. App. 678 (Div. III, 1992)

**Facts:** (Excerpted from Court of Appeals opinion)

On the evening of September 11, 1989, a gas station clerk telephoned the police and reported a series of six or seven young people had approached a white car parked nearby, exchanged something with the passenger of the car, and left. The information was relayed by radio dispatch and sheriff's deputies responded. When he located the car, uniformed deputy Shane McClary activated his emergency lights, approached Mr. Reeb, who was seated in the driver's seat, and asked him for identification. A radio check disclosed Mr. Reeb had 10 failures to appear occurring after 1987. Mr. Reeb was arrested; marijuana and cocaine were found in a subsequent search of the vehicle. The passenger, Martha Coup was also arrested.

Proceedings:

Reeb lost his motion to suppress the illegal drugs seized in the September 11 arrest, and he was convicted of possession of a controlled substance. (He was also convicted in the same trial on three other counts of possessing a controlled substance for three other possession incidents not addressed in this opinion.)

ISSUE AND RULING: (1) Did the officer have "reasonable suspicion" justifying the seizure of Reeb? (ANSWER: Yes); (2) Was the custodial arrest, and hence the search of Reeb incident to that arrest, lawful? (ANSWER: Yes, because of his history of FTA's). Result: Spokane County Superior Court convictions for VUCSA affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Reasonable Suspicion

The actions of the sheriff's deputy in activating his overhead emergency lights, approaching Mr. Reeb, and asking him to identify himself constituted a seizure. The deputy testified Mr. Reeb was not free to leave. However, the complaint from the identified gas station clerk, describing the activities of several young people engaging in some transactions with a car parked by the gas station late at night, set forth facts that created the requisite suspicion of criminal activity justifying an inquiry and investigation. The initial detention was lawful.

(2) Custodial Arrest

Having detained Mr. Reeb and ascertained his name, the sheriff's deputy learned over the police radio that Mr. Reeb had 10 notices of failure to appear on his driving record since 1987 according to the Department of Licensing. The deputy thereupon arrested Mr. Reeb pursuant to former RCW 46.64.020(3), which provided in relevant part:

Any person who drives a motor vehicle within the state and has accumulated two or more notices of failure to appear on his or her driving record maintained by the department of licensing . . . shall be guilty of failure to comply, a gross misdemeanor. . .

Probable cause for arrest under this subsection is established by the officer obtaining, orally or in writing, information from the department of licensing

that two or more notices of failure to appear are on the person's driving record.

Mr. Reeb contends that because the Department of Licensing records fail to distinguish between failure to pay a fine, which was not a separate crime at the time of his arrest, and failure to appear, information from the Department of Licensing is constitutionally insufficient to establish probable cause.

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed.

. . . Thus, the information provided by the Department of Licensing need only be reasonably trustworthy, not absolutely accurate, to provide a basis for finding probable cause.

In order to provide a basis for the search of a vehicle, the arrest of the driver must be more than the brief detention generally authorized by RCW 46.64.015. State v. Hehman, 90 Wn.2d 45 (1978) held custodial arrest based on a minor traffic offense was improper. In 1979, the Legislature decriminalized most traffic offenses, creating a list of minor offenses for which no arrest is authorized. See RCW 46.63; Laws of 1979, 1st Ex. Sess., ch. 136. The Legislature also specified misdemeanor traffic offenses for which full custodial arrest upon probable cause is expressly authorized. See RCW 10.31.100(3); Laws of 1979, 1st Ex. Sess., ch. 28, § 1; RCW 46.64.015; Laws of 1979, at Ex. Sess., ch. 28, § 2. Thereafter, a series of decisions has established the rule that custodial arrest for a traffic offense which retained its misdemeanor status following decriminalization is proper if the arresting officer could reasonably believe the individual would disregard his promise to appear.

Two or more failures to appear constitute failure to comply, a gross misdemeanor, not a mere traffic infraction. RCW 46.64.020(33); see RCW 46.63.020. In 1988, the Legislature amended RCW 46.64.020 to include an express legislative finding:

Approximately twenty percent of all people issued notices of infraction and citations violate their written and signed promise to respond or appear and obtain notices of failure to respond or appear on their driving records. Through their actions, these people are destroying the effectiveness of the traffic law system and undermining the department of licensing regulatory control of drivers' licenses.

RCW 46.64.020(1)(d). The Legislature failed to include failure to comply in the list of misdemeanor offenses for which full custodial arrest is authorized. See RCW 10.31.100(3). However, the accumulation of two or more notices of failure to appear or respond is substantial evidence which would warrant an arresting officer's belief the person who has done so would be unlikely to respond to yet another citation. Accordingly, custodial arrest of an individual who has accumulated 10 notices of failure to appear is proper and sufficient to support a search of the vehicle driven by that individual.

[Some citations omitted]

***ELECTRONIC INTERCEPT ORDER UNDER PRIVACY ACT (9.73) SUPPORTED BY SHOWING THAT OTHER NORMAL INVESTIGATIVE EFFORTS WOULD LIKELY BE INADEQUATE***

State v. Cisneros, 63 Wn. App. 724 (Div. I, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

On January 21, 1988, a controlled purchase of cocaine was arranged by telephone between Cisneros and an informant. Detective David Bales of the Snohomish County Sheriff's office was present with the informant during the telephone conversation. Detective Bales also conducted physical surveillance of the purchase, which occurred at a restaurant. Detective Bales observed defendant accept payment for the cocaine, but did not observe the actual delivery, which occurred in the restroom of the restaurant. Delivery was accomplished not by Cisneros, but by a "Robert".

On January 27 and February 2, 1988, similar scenarios were repeated, except that Cisneros did not come to the meeting place himself. The deliveries were made by "Robert" and "Tony", but telephone contact was always with Cisneros. Detective Bales was present and observed these transactions as he had the first one.

During the February 2 transaction, "Robert" told the informant that the cocaine came directly from Cisneros, who was a good supplier. After the transaction, Detective Bales followed "Robert" to a residence where he found a car registered to Cisneros. The same car was found parked there on subsequent occasions.

In several telephone conversations, Cisneros told the informant that he would not meet or talk with anyone he did not know, and would not deliver cocaine himself. Defendant stated that the persons who delivered the cocaine were employed by him.

On February 3, Detective Bales obtained authorization to intercept and record telephonic and personal conversations of the informant with Cisneros and his runners. The application stated that normal investigative techniques had proven insufficient because Cisneros refused to talk to unknown persons (undercover officers). The application also stated that recording the conversations would help the State rebut a possible allegation of entrapment and would enhance the credibility of the informant, who had a criminal background. The order authorizing interception found that "[n]ormal investigative techniques reasonably appear to be unlikely to obtain convincing, accurate evidence of the crimes".

On or about February 4, another drug transaction occurred and was recorded by the informant. Cisneros was charged with delivery of cocaine in the January 21 transaction, and conspiracy to deliver cocaine in the transactions of January 21 and 27, February 2, 4, and 5, 1988. Defendant's motion to suppress the evidence obtained pursuant to the intercept order was denied. An amended information narrowed the charges to delivery of cocaine on January 21 and conspiracy to deliver cocaine on February 4. Cisneros was convicted of these charges in a

stipulated trial and sentenced within the standard range.

ISSUE AND RULING: Did the application for authorization to do the intercept satisfy the requirement of RCW 9.73.130(3)(f) which requires that the intercept be authorized only if other normal investigative procedures would be inadequate? (ANSWER: Yes) Result: Snohomish County Superior Court conviction for conspiracy to deliver a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 9.73.090(2) provides, in pertinent part:

It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation *where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent* to the interception, recording, or disclosure: *Provided*, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony[.]

[Court's emphasis] RCW 9.73.130 provides:

...

Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:

...

*A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]*

[Court's emphasis] RCW 9.73.130(3)(f).

A judge issuing an intercept order has considerable discretion to determine whether the statutory safeguards have been satisfied. . . .

The showing required of law enforcement officials under RCW 9.73.130(3)(f) is not one of absolute necessity. "[P]olice officials need not exhaust all alternatives, but must seriously consider other techniques, and the authorizing court must be informed of the reasons the alternatives have been or likely will be inadequate." . . .

In State v. Platz, 33 Wn. App. 345 (1982), this court held the trial court did not err in refusing to exclude a tape-recorded confession made to an undercover officer in a first degree murder case. The appellant argued that the police application did

not meet the statutory requirements because the undercover officer could testify to the conversation, thereby obviating the need for a recording. We rejected the argument, finding that interception was necessary to avoid the case being reduced to a one-on-one swearing contest. . . .

In State v. Irwin, [43 Wn. App. 553 (1986)], where drug transactions were recorded by an informant, we held the police application was adequate where it stated that defendants would not deal with new parties (undercover officers and physical surveillance was impossible).

As in Irwin, it was impossible here for police to introduce an undercover officer. As in Platz, the recording avoided a one-on-one swearing contest. While we do not wish to extend the relaxed standard of Irwin and Platz any further, the facts here are not sufficiently distinguishable to warrant departure from those precedents.

Appellant urges this court to rely on several federal cases cited in his brief. While the provisions of the federal statute, 18 U.S.C. § 2518(1)(c) and (3)(c), are nearly identical to those of the Washington statute, we decline to rely on the federal cases for two reasons. First, the federal requirement of judicial authorization applies only where no party has consented to the wiretap. Concerns about individual privacy are more acute in that situation than in the 1-party consent situation addressed by the Washington statute at issue here.

Second, the federal cases cited by appellant appear to require a greater showing of necessity for interception than is required in the Washington cases. . . .

By contrast, the Washington courts have held that the issuing judge may take into account proof difficulties inherent in the type of crime alleged, e.g., a gambling operation is essentially a telephone crime. Furthermore, this court has approved a wiretap order where the only justification for the order was to bolster the credibility of the testifying undercover officer.

Based upon these Washington cases, we are constrained to hold that the trial court did not abuse its discretion in issuing the order. We nevertheless caution that our decision should not be interpreted as permitting intercept orders where normal investigative techniques would suffice.

[Some citations omitted]

#### **LED EDITOR'S NOTE:**

**The Court of Appeals also rejects Cisneros' claim that the electronic intercept violated his privacy rights under the Fourth Amendment and the state constitution, article 1, section 7. The Court of Appeals also rejects Cisneros' argument that the officer-applicant made two material misstatements in the intercept application, and that he was therefore entitled to an evidentiary hearing on the adequacy of the intercept application. The Court of Appeals analysis of this issue is as follows:**

Appellant claims there were two material omissions here. First, he points out that police reports reveal that certain currency used in the controlled purchases was photocopied and some of the photocopied bills were found in appellant's

possession when he was arrested. While this evidence is significant, it was not possible for the police to have known prior to appellant's arrest whether the bills would be found in his possession upon arrest. The currency involved in the transactions may have been laundered by the time of arrest. Indeed, only two of the photocopied bills were found in appellant's possession when he was arrested. The omission from the affidavit of the fact that currency had been photocopied is therefore not a material omission.

Appellant secondly points out that more than one detective participated in physical surveillance of the drug purchases involved here. While it is true that Detective Bales' affidavit mentions only his own participation, this omission is not material. Testimony by several officers to the same facts observed by a single officer would not materially strengthen the State's case. For these reasons, the trial court did not err in refusing to hold an evidentiary hearing regarding the alleged material omissions.

### **LED EDITOR'S COMMENT:**

**This case did not involve the 1989 amendments to chapter 9.73 RCW allowing single-party consent-agency-authorized interceptions under RCW 9.73.210 and 9.73.230. See discussion of the 1989 amendatory enactment at July '89 LED and October '89 LED. The latter sections allow agency-authorized interceptions in specified drug-investigation circumstances. There is no requirement under either of those sections of the statute that a showing of impracticability of other investigative methods be shown. Only court-authorized interceptions under RCW 9.73.130 and 9.73.090 require the kind of showing which was the subject of this appeal.**

### **CONSENT TO SEARCH CAR IS CONSENT TO SEARCH CONTAINERS IN CAR**

State v. Mueller, 63 Wn. App. 720 (Div. I, 1991)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

A Washington State trooper stopped a vehicle driven by Mueller on suspicion of driving while intoxicated. During the course of the stop, the trooper asked Mueller if he would consent to a search of his car.

At the suppression hearing, the trial court found based on disputed testimony that Mueller gave a general, unqualified consent to search the vehicle for guns and drugs. A search of the entire car including the trunk was conducted. Mueller was cooperative and did not request the trooper to stop the search at any point.

During the search, the trooper asked defendant if a gym bag in the car belonged to him. According to the trooper's testimony, defendant stated that it did. The trooper unzipped the bag and searched its contents. The search revealed a plastic baggy containing white powder, a grinder, and a funnel. The trooper also found a false-bottomed aerosol can containing four bindles of white powder. In addition, the trooper found a wallet containing over \$1,000 cash and items with defendant's name on them. Mueller testified that the gym bag did not belong to him.

[The trial court denied Mueller's suppression motion and convicted him of possession of a controlled substance with intent to deliver.]

ISSUE AND RULING: Did Mueller's consent to search his car authorize a search of a gym bag in his car? (ANSWER: Yes) Result: King County Superior Court conviction for VUCSA affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A consensual search is valid if; (1) the consent is voluntary; (2) the consent is granted by a party having the authority to consent; and (3) the search is limited to the scope of the consent given. . . . The scope of consent may be limited by the consenting party with respect to the area to be searched and the purpose of the search.

A general and unqualified consent to search an area for particular items permits a search of personal property within the area in which the material could be concealed. . . . Appellant asserts that he consented to a search of his automobile "for weapons and possibly guns" but not to a search of the zipped gym bag and its contents. However, the trial court determined that the consent given was general and unqualified because defendant did not expressly or impliedly limit its scope. Further, the court found that the express objects of the search were guns and drugs. Based on these findings, the judge ruled that the search had not exceeded its permissible scope.

[The Court of Appeals then discusses a prior Washington Court of Appeals decision --State v. Jensen, 44 Wn. App. 485 (1986) Nov. '86 LED:11 and then discusses the recent U.S. Supreme Court decision in Florida v. Jimeno, as follows:]

In Florida v. Jimeno, [114 L.Ed.2d 297 (1991) Aug. '91 LED:14] the defendant was stopped for a traffic infraction and on suspicion of drug trafficking. The defendant consented to a search of his car. During the search, the officer opened a brown paper bag containing cocaine.

The Supreme Court ruled the search did not exceed the authorized scope because defendant had not placed any limits on the search. In addition, the officer had expressly stated he would be searching for narcotics. Although the court noted that a suspect may restrict the scope of a search as he or she chooses, the majority concluded as follows:

We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container.

We acknowledge that article 1, section 7 of the Washington State Constitution provides greater protection of privacy interest than the Fourth Amendment. . . . In this case, however, the search did not exceed the scope of the consent under either a federal or state constitutional analysis. The trial court determined that the express purpose of the search was to look for guns and drugs and that Mueller did not expressly or impliedly limit the scope of the search. Accordingly, the search of

the gym bag did not exceed the scope of the consent given because the objects of the search reasonably could have been contained in the gym bag.

[Some citations omitted]

### **SHOPLIFTER'S ASSAULT ON STORE PERSONNEL IS THIRD DEGREE ASSAULT**

State v. Jones, 63 Wn. App. 703 (Div. I, 1992)

Facts: (Excerpted from Court of Appeals opinion)

On May 13, 1989, Larry Jones visited the Federal Way Stock Market Food Store. The facts were controverted. Jones testified that he decided not to make a purchase and attempted to exit without going past the check stands by walking back through the "aisle of values" to the entrance. However, two store employees, Greg Larson and Kevin Dunn, testified that they saw Jones pushing a shopping cart full of cardboard as he traveled the wrong way down the entrance aisle of the store. Because Larson knew that cardboard is often used to cover shoplifted goods, Larson stepped between Jones and the door. At that point Larson noticed that the cardboard box in the shopping cart partially concealed a large number of cigarette cartons, and Larson asked Jones where he was going with the cigarettes.

Immediately, Jones stopped around the cart and tried to exit the store. Although it was disputed, Larson attempted to detain Jones by grabbing Jones close to his wrist, and Jones threw a punch at Larson's head causing Larson to release his grip. Larson then grabbed Jones' coat, and the two continued their scuffle as Jones exited the store. Outside the store Larson wrestled Jones to the ground with the help of two employees, Kevin Dunn and Ed Nelson. Jones struggled, kicked, and cursed the employees, kicking Dunn in the back several times before the police arrived.

[Some citations omitted]

Proceedings:

Jones was convicted of second degree theft and third degree assault.

ISSUE AND RULING: Was there sufficient evidence to support the conviction of Jones for third degree assault? (ANSWER: Yes) Result: King County Superior Court convictions for second degree theft and third degree assault (two counts) affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A defendant is guilty of assault in the third degree if he assaults another with intent to resist a lawful detention. RCW 9A.36.031(1)(a). Jones avers that the assault conviction is reversible because the State did not prove beyond a reasonable doubt that the detention was lawful, that Jones had intent to resist, and that Jones assaulted Larson and Dunn.

First, Jones claims that the State did not prove the detention was lawful. However, detention by store personnel is lawful if the store personnel have "reasonable

grounds to believe" the person detained "was committing or attempting to commit theft". RCW 9A.16.080. Because Jones was seen pushing a shopping cart containing 61 cartons of cigarettes toward the store entrance without having paid for them, the trier of fact could properly have concluded that the store employees had reasonable grounds to believe Jones was committing theft. Thus, the State's evidence is sufficient to show that Jones' detention was lawful.

Next, Jones claims that the State failed to prove beyond a reasonable doubt that Jones intended to resist detention. However, his challenge must be evaluated in light of "the State's evidence and all inferences that reasonably can be drawn therefrom." The State presented evidence that Jones resisted detention by swinging a round-house punch at Larson as Jones attempted to exit the store, by dragging Larson with him to the parking lot, and by struggling as Larson, Dunn, and Nelson subdued him on the ground. In light of this evidence, the trier of fact could have found that the State had proved resistance beyond a reasonable doubt.

Finally, Jones alleges error in the jury's finding that Jones assaulted Larson and Dunn. Assault is "an intentional act, with unlawful force, which creates in another a reasonable apprehension . . . of bodily injury even though the actor did not actually intend to inflict bodily injury." In addition, assault is the intentional touching "of the person or body of another, regardless of whether any actual physical harm is done to the other person." The trier of fact could properly have found that Jones assaulted Larson because Jones swung at Larson to escape detention and Larson ducked to avoid the blow. Also, the trier of fact could have found that Jones assaulted Dunn because he kicked Dunn while attempting to escape. Thus, the jury could properly find that the State had proved the elements of assault beyond a reasonable doubt . . .

[Some citations omitted]

#### **LED EDITOR'S NOTE:**

**The Court of Appeals also holds that there was sufficient evidence to support Jones' second degree theft conviction, analyzing the facts as follows:**

Both Greg Larson and Kevin Dunn saw Jones pushing the shopping cart the wrong way down the "aisle of values" toward the store entrance. Larson saw Jones push the cart full of cigarettes to within 10 feet of the door. When Larson stopped Jones to ask what he was doing, Jones did not offer a reasonable explanation. Instead, Jones denied he was taking the cigarettes, immediately attempted to exit the store, and swung at Larson when Larson tried to detain him. On these facts a jury could have found that Jones had committed second degree theft beyond a reasonable doubt.

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